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IN THE

Supreme Court of the United States

OCTOBER TERM, 1973

Supreme Court No.....

Court of Appeals No. 73-1120

HURD-DARBEE, INC., a Michigan corporation,
Petitioner

vs.

UNITED STATES OF AMERICA,
Respondent

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

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Petitioner prays that a Writ of Certiorari issue to review the Judgment of the United States Court of Appeals for the Sixth Circuit entered on June 13, 1973.

OPINIONS BELOW

The opinion of the District Court for the Eastern District of Michigan, Southern Division (Civil Action No. 27850) rendered December 7, 1972 has not been officially reported.

The Per Curiam opinion of the Court of Appeals for the Sixth Circuit (No. 73-1120) rendered June 13, 1973 has not been officially reported.

Copies of said opinions are appended hereto.

JURISDICTION

The Per Curiam opinion of the Court of Appeals for the Sixth Circuit was decided and filed on June 13, 1973 (No. 73-1120). A copy of said opinion is appended to this petition as Appendix B. The Jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTIONS PRESENTED FOR REVIEW

Petitioner *Hurd-Darbee, Inc.* ("Hurd"), a private contractor, was the successful bidder for the contract to operate the United States Air Force Language School at Lackland Air Force Base, Texas from July, 1961 to August, 1965. During said period Petitioner developed an ongoing business, with between forty-five (45) and sixty-five (65) employees, with special expertise and experience in teaching English to foreign nationals. Petitioner averaged a profit of $43,413.50 per year from its organization.

After issuing an Invitation for Bid for the contract for services for the 1965-1966 contract year, the Government withdrew the bid claiming the services were no longer necessary. However, the services were continued as the Air Force proceeded to convert the school to Civil Service status. Government officials then called a meeting of all of Petitioner's employees (at least forty-five) at the Language School, advised them they would be without a job unless they joined Civil Service, and then proceeded to hire virtually all of Petitioner's employees at a substantial increase in pay.

The Petitioner now seeks to be compensated for the intangible value of the organization it developed which was taken over by the Government.

The questions presented for Review are:

1. Can there be expropriation under the Fifth Amendment even though no "physical assets" are taken?

2. Whether the acts of the Government in taking over the Lackland Language School by calling all of Petitioner's employees together at one meeting, advising them they would be without jobs unless they joined civil service, and then proceeding to hire virtually all Petitioner's employees at said Language School (at least forty-five) constitute an expropriation of the on-going value (goodwill) of Petitioner's business so as to entitle Petitioner to compensation as required by the Fifth Aemndment to the Constitution.

CONSTITUTIONAL PROVISIONS AND FEDERAL STATUTES INVOLVED

The Constitutional provisions relating to the Questions Presented for Review are those sections of the Fifth and Fourteenth Amendments which require due process of law and require compensation for the expropriation of private property as follows:

AMENDMENT V—CAPITAL CRIMES; DOUBLE JEOPARDY; SELF-INCRIMINATION; DUE PROCESS; JUST COMPENSATION FOR PROPERTY

No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offense to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.

AMENDMENT XIV—CITIZENSHIP; PRIVILEGES AND IMMUNITIES; DUE PROCESS; EQUAL PROTECTION; APPORTIONMENT OF REPRESENTATION; DISQUALIFICATION OF OFFICERS; PUBLIC DEBT; ENFORCEMENT

Section 1. All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

STATEMENT OF THE CASE

This Civil Action was originally filed under the jurisdictional provisions of 28 U.S.C. §§1346 and 2674, with a five-count Complaint claiming damages for the Government's expropriation of Petitioner's entire business organization at Lackland Air Force Base, damages for failure to follow statutory procedures in awarding bids and damages for the illegal and tortious seizure of Petitioner's property. It is Petitioner's contention that the acts complained of constituted a Tort under Texas law and the other counts were joined under FR Civ P, 18.

The facts were stipulated to by the parties. A fair presentation of the facts is set forth in the United States District Court opinion which is Appendix A. Although Petitioner accepts those facts as presented, it, of course, does not accept the conclusions derived therefrom.

For four years (July, 1961-August, 1965) Petitioner HURD-DARBEE, INC. was the lowest qualified bidder and operated, as an independent contractor, the language school at Lackland Air Force Base, Texas. The school's mission was to teach English to foreign nationals. Although Petitioner was the lowest bidder on the contract for the next year (August, 1965-August, 1966), it was disqualified for financial reasons (disputed). The Air Force then tried to hire other contractors to perform the contract. When this proved unsuccessful, the Government cancelled the Invitation for Bid claiming the services were no longer needed.

Persons who have experience and skill in teaching English as a foreign language to foreign nationals are far more difficult to locate than ordinary language teachers.

The officials at Lackland apparently recognized they had no other source than Petitioner when they called together all of Petitioner's employees, advised them they would be without jobs unless they joined Civil Service, and then offered all present a substantial pay increase to join Civil Service.

The Government then proceeded to hire virtually all of Petitioner's employees at Lackland to do exactly the same job they were doing for Petitioner. In effect, the only difference at the school was that the Respondent took over the operation of the school from Petitioner.

Petitioner commenced this action asking for compensation for the on-going value of its business which the Government thereby expropriated. The Respondent, the United States District Court and the Court of Appeals have taken the position the Government can take over privately-owned businesses in this manner, although the Court of Appeals did state:

> "The action of the Air Force in dealing with the employees of appellant was certainly not a model of ethical business behavior."

Petitioner submits that said acts constitute a tortious and wrongful conversion of property under Texas law, *American Surety Company* v *Hill Company*, 254 S.W. 241 (1923), or at least a deprivation of property by the United States of America which entitles Petitioner to compensation therefor under the Fifth Amendment to the Constitution.

REASONS FOR GRANTING THE WRIT

The important question of Federal law presented, whether there can be an expropriation without physical assets, has never been decided by this Court. Further, the Court of Appeals decision in this action is in conflict with the decisions of this Court which have held that intangible value is compensable under the Fifth Amendment when attached to a physical asset.

The Court of Appeals, after recognizing that "The word 'property' as used in the Fifth Amendment has a broad meaning and includes the entire bundle of rights, not just the physical assets, against which the government moves", nevertheless distinguished two cases on which Petitioner relied because "the underlying action of the government was against the physical property of a citizen."

Petitioner submits that the Fifth Amendment requires compensation for expropriated intangible property even though no physical assets are taken. The same logic which requires compensation for intangible value attached to physical assets should apply to intangible value without the physical assets.

The Lackland Language School Division of Hurd-Darbee, Inc., the Petitioner, was created for the purpose of teaching English to foreign nationals. Such a mission requires skills different from those of the ordinary language teacher who teaches a foreign language to one who speaks English. As most companies prefer to locate near their best markets, the Language School Division and the personnel were located at Lackland Air Force Base in San

Antonio, Texas, the site of the market for such services. Over the years Petitioner had developed a compatible organization, implemented new teaching methods, produced learning manuals and had developed a profitable organization with the ability to under-bid all competitors. This organization provided its owners with an average net profit of $43,413.50 per year. The organization has matured beyond the usual organization costs and growing pains into a successful working unit so competent that the Government saw fit to take it intact. This organization, the result of the efforts of Petitioner's management, represented real value to its owners. At trial, R. G. Hudson, an executive recruitment specialist, testified the cost of recruiting and hiring just the persons necessary to meet the specifications set forth in the Invitation for Bid would be at least $40,875.00. The on-going value of the business was not included in that figure. It is common knowledge that many organizations are built around a few key employees, let alone forty-five or more.

If one accepts the position that Petitioner's on-going business had value (goodwill) including said cost of organization and development, etc., then the opinion of the Court of Appeals in this action is in conflict with *Monongahela Navigation Co.* v *United States,* 148 US 312, 13 S Ct 622, 37 L Ed 463 (1893).

The Plaintiff there owned a toll bridge which crossed the Monongahela River. The Government took the bridge for its own use and the issue of compensation was argued before the U. S. Supreme Court. In a very fine opinion setting forth the history of the Fifth and Fourteenth Amendments, Justice Brewer found that plaintiff was entitled to going-concern value where the Government actually took over a going business, as in the Hurd-Darbee

situation. The Court applied the following test in determining the value of property taken:

> "The value of the property, generally speaking, is determined by its productiveness—the profits which its use brings to the owner. Various elements enter into this matter of value."

The Court then proceeded to show that the demand for the use of the lock and dam on the Monongahela was great, while a precisely similar property on a stream where there was less commerce would be less valuable. The Court summarized its point as follows:

> "The value, therefore, is not determined by the mere cost of construction, but more by what the completed structure brings in the way of earnings to its owner. For each separate use of one's property by others, the owner is entitled to a reasonable compensation and the number and amount of such uses determines the productiveness of the earnings of the property and therefore largely its value."

Just as the particular location and existence of the developed business in the *Monongahela* case resulted in on-going-concern which produced earnings, Petitioner had developed an on-going organization located at Lackland. The District Court opinion appended hereto describes how the Procurement Officers at Lackland could find no other qualified on-going concern to provide the services which Petitioner provided at the Language School. Therefore, Petitioner's location at Lackland Air Force Base resulted in it having greater value than if the organization had been located elsewhere. That the Government was unable to perform the services desired without Petitioner's organization is no excuse for expropriation without compensation.

In *Monongahela*, the Court concluded:

> "Hence it is manifest that the income from the bridge was a necessary and proper subject of inquiry before the jury."

The Court of Appeals decision in this action is also clearly in conflict with a whole line of authority of this Court as set forth in *Des Moines Gas Co.* v *Des Moines*, 283 US 153, 35 S Ct 811, 59 L Ed 1244 (1915). This case involves the Government takeover of Utilities and this Court concluded that the going-value of a company is an element in the value of a property taken for public use. That opinion cites numerous cases in support of the proposition that the value of an on-going business is greater than the sum total of its assets.

Further, it is axiomatic that Patents which are strictly intangible in nature, have value capable of being taken by another.

The takeover by the Government of an entire on-going business organization without proper compliance with the Fifth and Fourteenth Amendments has long been declared illegal. *Youngstown Sheet & Tube Co.* v *Sawyer*, 343 U.S. 579, 72 SC 863, 96 LEd 1153 (1952).

It is not even necessary that the Government take the business. It is enough if they destroy it, or render it unsuitable for its business purpose. In *United States* v *967.-905 Acres of Land*, 305 F Supp 83 (1969), the Court held that a condemnee was entitled to compensation for his on-going business where the owner was forced to abandon his previous activities.

Petitioner submits that the Court of Appeals was clearly in conflict with *Monongahela, Des Moines* and long established patent law when it ruled:

> ". . . the Fifth Amendment requirement of compensation was not satisfied unless the owner was paid for property rights which adhered directly to the assets which were affected by the governmental action . . ." (see App. B, Page 31 below)

The Court of Appeals in this action pointed out that the Government's actions were "not a model of ethical business practice". Petitioner submits that when Petitioner loses his business from the unethical use of Government power, that the Government is required to compensate petitioner for said loss.

To distinguish between the hiring away of one, two or several employees from the hiring of an entire organization may be a difficult concept to administer; however, the anti-trust cases provide much precedent for rules which have to be applied on a case by case basis depending on facts unique to a particular situation. If the Government needed and wanted the on-going business, the Government was required to proceed with due process of law before taking Plaintiff's on-going concern. This the Government did not do.

Therefore, Petitioner submits it is entitled to be compensated for the intangible value of its on-going business (goodwill) which the Respondent expropriated.

Because this Court has never decided the important issue of whether the government must comply with the Fifth Amendment when depriving one of strictly intangible property, and because the Court of Appeals Opinion in this action is in conflict with cases which hold the value of intangible property is compensable when incidental to tangible property, petitioner prays that this Court grant this Petition and issue a Writ of Certiorari.

CONCLUSION

For the reasons aforementioned, Petitioner prays that a Petition for Writ of Certiorari to the Court of Appeals for the Sixth Circuit be granted.

Respectfully submitted,

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APPENDIX A

OPINION AND ORDER OF JUDGMENT FOR DEFENDANT

(U. S. District Court—Eastern District of Michigan—Southern Division)

(Hurd-Darbee, Inc. v. United States of America)

(No. 73-1120)

(Filed December 7, 1972)

At a session of said Court, held in the Federal Building, in the City of Detroit, Wayne County, Michigan, this 7th day of December, 1972.

Present: The Honorable Fred W. Kaess, Chief United States District Judge.

This is a civil action against the United States of America under §§1346 and 2674 of Title 28 of the United States Code.

Plaintiff's claim arises out of the following facts. The USAF Language School is a military organization operated by the United States Air Force. It has been in operation at Lackland Air Force Base, Texas, for a number of years. Its mission is the instruction in the English language of military personnel, both officer and enlisted, and occasionally civilians, from various allied foreign countries. The purpose of this is to enable these allied personnel to enter into programs conducted at military installations throughout the United States for their further training in equipment use and military methods. The Language School is one of a number of specialized military training organizations under the 3275th Technical School, USAF, at Lackland Military Training Center.

Lieutenant Colonel Harold F. Coverdale, USAF, is Commander of the Language School which is operated and supervised by him and his military staff. Civilian employees of the Air Force are employed in accordance with Civil Service Regulations as language instructors. In order to supplement the number of such civilian employees authorized and available, the Air Force has for several years past, by advertised procurements for nonpersonal services and Government contracts, purchased instructor services from civilian firms engaged in supplying such services. Detailed specifications were issued for each instructor. The requirements were estimated, based on anticipatd student loads, and were bought on instructor months as the unit of purchase. For four consecutive years, Hurd-Darbee, Inc., of Detroit, Michigan, was the lowest responsive and responsible bidder, was awarded the instructor services contract, and performed the services. Under said arrangement, the instructors were hired by and paid by Hurd-Darbee, Inc. Further, the instructors reported to a supervisor employed by Hurd-Darbee, Inc. The last of these contracts was for the term 1 September 1964 to 31 August 1965 (Tab 1-A).

Hurd-Darbee, Inc. was the responsible bidder performing at the same time IFB #41-615-65-163 was issued for the year 31 August 1965 to 31 August 1966.

Correspondence from the Basement Procurement Division, 3700th Maintenance and Supply Group, Lackland Military Training Center, to the Language School resulted in the Language School's requirements and authority for the procurement, for the 1 September 1965 through 31 August 1966 contract term being submitted on Request for Purchase, AF Form 9, dated 21 May 1965 (Tabs 1-A, 1-B). The Invitation for Bids on Standard Form 33 was prepared by Mrs. Lorraine E. Weyman, senior agent in charge of the Nonpersonal Services Section of the Ser-

vices Branch of the Basement Procurement Division, and was issued on 14 June 1965. The procurement had been set aside for small business synopsized to the Commerce Department Field Office, Chicago. The Invitation for Bids was sent to thirty-nine bidders, including the then current contractor, Hurd-Darbee, Inc. (Tabs 1-A, 1-C, 1-D). Eight bids were received. The bids were publicly opened at the designated time and place on 21 July 1965 by Mr. Verner L. Shaw, Deputy Base Procurement Officer. Mrs. Weyman was present and recorded the bids as Mr. Shaw opened and read them. Also present were Lieutenant Colonel Coverdale, Commander of the Language School, and Mr. William F. McCarthy, the representative of Hurd-Darbee, Inc. Hurd-Darbee, which was then on the last laps of its 1964-1965 contract term, was the low bidder with its price of $454.75 per instructor month. Mr. McCarthy telephoned his employer and informed Mr. Hurd that Hurd-Darbee was the low bidder and had the contract tentatively until the audit agency could "check out" the firm. Mr. McCarthy had been aware from the Invitation for Bids that such an investigation "would be required or probable" (Tabs 1-D, 1-E, 2-A, 2-C, 6-B).

During the early part of 1965, Mr. Shaw had received an unsolicited letter of 15 December 1964 from the U.S. Navy Area Audit Office in Chicago, which had attached to it a report on Hurd-Darbee's financial condition which was considered by the Navy Audit Office to show a weakness which could impair the performance of Government contracts yet to be completed. These latter included Hurd-Darbee's contract for furnishing instructor services to the Language School. Lieutenant Colonel Coverdale, while the Invitation for Bids were out to bidders, had expressed concern to Mr. Shaw in connection with Hurd-Darbee's financial condition. He had informed Mr. Shaw also that the paychecks of Hurd-Darbee's instructors had been re-

turned unpaid by the contractor's bank in June or July, 1965. When it was found on 21 July 1965 that Hurd-Darbee was the low bidder, Lieutenant Colonel Coverdale, who had previously asked for a financial survey of whichever bidder was low, reminded Mr. Shaw of this. Mr. Shaw informed Lieutenant Colonel Coverdale that he, Shaw, would not be able to make the prerequisite Certificate of Contractor Responsibity for award to Hurd-Darbee unless he had first a formal Pre-Award Survey in the area of financial capability, which is included in Responsibility (Tabs 1-A, 2-A, 2-B, 2-C, 2-F, 6-B, 6-C, 6-D). Paragraph J, on page 13 of Standard Form 36, included in the Invitation for Bids, advised bidders that financial condition was among the factors subject to survey in arriving at a determination of bidder's ability to perform (Tab 1-D). The use of pre-award surveys to determine a contractor's responsibility is always required as standard procedure under ASPR 1905.4 when the contracting officer does not have all the information required for him to make a determination regarding contractor's responsibility.

On 22 July 1965, the day after bid opening, Mrs. Weyman addressed DD Form 1524, Pre-Award Survey of Prospective Contractor to the Defense Contract Administration Services Region (DCASR), Detroit, requesting a financial capability survey of Hurd-Darbee. She requested reply by 2 August 1965. An extension was required by DCASR and Mrs. Weyman's request date was changed to 12 August 1965.

On 16 August Mrs. Weyman had not received the report. She telephoned the DCASR office and was informed of the finding that Hurd-Darbee's financial condition was unsatisfactory and that the report had been mailed (Tabs 1-A, 2-D). The fact that the pre-award survey results were

not communicated until 16 August 1965, which resulted in a situation whereby Hurd-Darbee, Inc., was prevented from obtaining a Certificate of Competency from the Small Business Administration because of a fifteen day requirement of the S.B.A.

Also, on 16 August 1965 a TWX was dispatched from the Office of the Secretary of the Air Force to Headquarters, Air Training Command, the higher headquarters of Lackland Military Training Center. The TWX stated that the Invitation for Bids for language instruction would be canceled because review by the Secretary's General Counsel had determined that such contract might well be subject to attack by the Civil Service Commission and the Comptroller General. The TWX advised that the needed services should be temporarily continued either by extension of present contract or negotiation for as short a term as possible, not to exceed six months (Tab 3-A).

Also, on 16 August 1965, Mr. Shaw, after learning of the DCASR's findings and recommendation, telephoned procurement officials at Headquarters, Air Training Command and discussed this and the possibility of requesting a Certificate of Competency for Hurd-Darbee from the Small Business Administration. There was not sufficient time for such processing but it was decided to telephone the Small Business Administration and request expediting. It was necessary that the Language School Commander know by 25 August whether there would be a contract. Mr. Shaw had been advised, in his conversation with his higher headquarters on that date, to consider award to Hurd-Darbee for a six month period, notwithstanding the DCASR report which had been made on the basis of a twelve-month contract. Mrs. Weyman then, still

on 16 August, at Mr. Shaw's direction, telephoned Mr. Hurd to ask if he was interested in negotiating an extension for six months. When Mr. Hurd inquired about the twelve-month contract on which he had bid, Mrs. Weyman informed him that because of recent rulings, they would be unable to procure these services by contract for more than a six-month extension. Mr. Hurd stated that he would telephone a price to her (Tabs 1-A, 2-A).

Mr. Shaw instructed Mrs. Weyman to immediately contact the next low bidder, English Language Services, so that negotiation with the next low bidder could begin. English Language Services agreed on price and instructors' reporting date of 23 August but later that same day telephoned that an increase in price would be necessary as well as change of reporting date because of its bringing instructors from outside of San Antonio. This was agreed upon and the contract was to be signed on 20 August 1965 (Tab 1-A).

On 19 August 1965, four telegrams of protest were received from Mr. Hurd of Hurd-Darbee. All activities were held in abeyance until the protest had been processed in accordance with regulations and decided at Headquarters, Air Force Logistics Command, Wright-Patterson Air Force Base, Ohio. The protest was denied at that Headquarters on 25 August 1965 and Mr. Hurd was so informed (Tabs 4-A, 4-B, 4-C).

Meanwhile, Lieutenant Colonel Coverdale had on 19 August consented to extend instructors' reporting dates until 1 September.

On 25 August, when notified of the ruling on Hurd-Darbee's request, a DD Form 1524 Pre-Award Survey was immediately requested on English Language Services, and on several other low bidders, from the respective DCASR

offices (Tab 2-E). On that same day, Mrs. Weyman phoned the Baltimore DCASR and learned that English Language Services was not in satisfactory financial condition for award of a contract (Tab 1-A).

Meanwhile, on 17 or 18 August, Lieutenant Colonel Coverdale, Colonel R. M. Batterson, Commander of the Technical School, and Mr. John Miller, the Civilian Personnel Officer, Lackland Military Training Center had a meeting in which alternatives were discussed. The target date was 24 August and a commitment had to be made for the continuing of the Language School mission on 1 September after Hurd-Darbee's contract expired on 31 August. Lieutenant Colonel Coverdale had been advised of the rulings on Hurd-Darbee's financial status. Because of the emergency created by not having a commitment at that late date, it was determined that an emergency hiring of civilian instructors could be accomplished if in event of no contract by the required date. On 19 August 1965, Lieutenant Colonel Coverdale had written a letter to the Base Procurement Division, setting out the urgency of the situation but consenting to delay in instructors reporting times until 1 September 1965 (Tabs 2-C, 3-C).

Due to the DCASR recommendation on 25 August on the second low bidder, English Language Services, and the fact that the third low bidder, World Technical Supply, was not qualified, it was decided by the Base Procurement Division to cancel the Invitation for Bids and resort to direct hire of instructors. Bidders were so notified on 25 August (Tabs 1-A, 2-A, 5-A, 5-B).

Also, on that Wednesday, 25 August 1965, after learning of the denial of Hurd-Darbee's protest, Lieutenant Colonel Coverdale called an emergency meeting of the Language School's approximately forty or forty-five con-

tractor's instructors. Mr. Sylvester W. Dracy and Mr. Orville P. Clark of the Civilian Personnel Office, Lackland Military Training Center, participated in the meeting. Lieutenant Colonel Coverdale informed the assembled instructors that there was no contract with any bidder effective on 1 September, that if award were to be made, he did not know when or to whom it would be made or become effective. He also told them that he was aware of their own contracts with Hurd-Darbee which expired on 31 August 1965, and that, to the best of his knowledge, none of them had contracts with Hurd-Darbee for September or a subsequent time. Lieutenant Colonel Coverdale also stated that there was a requirement for instructors to preclude mission failure of the School and that there would be an emergency hiring on a thirty-day basis. He further told the instructors that the decision as to whether they would seek Civil Service employment would be their own. He pointed out that representatives of the Civilian Personnel Office were present to answer questions and facilitate completion of application forms. Mr. Dracy explained that the grade would be GS-7 and informed the instructors of the annual salary of $6,050.00 per annum, while most instructors at Hurd-Darbee, Inc. were earning between $4,000 and $5,500 per annum. They were told that this was an emergency in which the Government could waive some of its qualification requirements for this temporary employment. The application forms were given to those who asked for them and blank forms were left in the building. Those who had elected to apply were processed and sworn in on 29 August, the following Monday. Some persons who had not attended the meeting applied and were accepted for the temporary appointments. The terms of employment of the newly hired instructors began on 1 September 1965. Their contracts of employ-

ment with Hurd-Darbee, Inc., expired on 31 August 1965. The hiring of the instructors, for employment to begin on 1 September, did not affect Hurd-Darbee's performance of its own contract, which was satisfactorily performed until its normal expiration on 31 August 1965 (Tabs 2-C, 6-A, 6-B, 6-C, 6-D and 6-E).

Subsquently, Air Force Procurement, approached a private contractor in California to take over the Lackland Language School by employing the Hurd-Darbee, Inc. personnel who had by this time been sworn into Civil Service.

William F. McCarthy, Hurd-Darbee's contract representative and supervisor, was one of those whose individual contract expired on 31 August and who elected to apply for the Civil Service appointment. He was one of two administrative persons employed by Hurd-Darbee on its Language School contract at Lackland Air Force Base. Lieutenant Colonel Ed Baxter served as Lieutenant Colonel William McCarthy's assistant and acted for him when Lieutenant Colonel McCarthy was not available. Hurd-Darbee had no material property in the Language School or on Lackland Air Force Base. The Air Force furnished all equipment and furniture. The contract called for it to supply only instructors to supplement the Civil Service instructors already working in the Language School (Tabs 2-C, 6-B, 6-E).

Hurd-Darbee subsequently filed additional protests of not being awarded the contract and of the Government's "expropriation" of its "entire property, equipment and organization of 60 teachers and supervisory personnel". These were duly processed and forwarded for decision (Tabs 7-A, 7-B). This installation has no information as to final disposition of Hurd-Darbee's 30 October 1965

protest to the Secretary of the Air Force. The previous protests were denied.

Hurd-Darbee, Inc. was unable to respond to Invitations for Bids by procurements of the Olmstead and Wright-Patterson Air Force Base for similar services (RFP No. 36-600-66-5012) because Hurd-Darbee, Inc. no longer had personnel to perform the contract if it were awarded to Hurd-Darbee, Inc.

Neither the United States Government or any of its agencies paid any compensation to Hurd-Darbee, Inc. for the actions taken by defendant which form the basis for this lawsuit.

Hurd-Darbee, Inc. stipulated to the following facts regarding its financial status:

(a) On 31 March 1965 Hurd-Darbee, Inc.'s financial statements showed a deficit in working capital of $44,800 and a deficit in net worth of $13,100.

(b) Hurd-Darbee, Inc. admits there were a number of overdrafts on the account, but denies that fact was the reason they were asked to close their account.

(c) Hurd-Darbee, Inc. admits that several paychecks were returned for non-sufficient funds when the defendant's checks to Hurd-Darbee, Inc. were not sent on time, but were held up when defendant received notice that plaintiff was attempting to finance its receivables.

(d) Hurd-Darbee, Inc. admits that commercial check mailed in payment of Employees' withholding income tax and FICA tax, received by Cognizant Government Office under date of 27 July 1965, was returned due to non-sufficient funds. A certified check was processed on 6 August 1965 in the total amount of $4,430.43 to meet that obliga-

tion. However, Hurd-Darbee, Inc. takes the position the check bounced because Hurd-Darbee, Inc. was not sent its monthly check by the Lackland Language School in accordance with standard procedure.

(e) That for the eight-month period ending 31 March 1965 Hurd-Darbee, Inc. had a profit of $14,320 before taxes, or 2.9% on its total sales of $494,334.

(f) Hurd-Darbee, Inc. recently performed under contract #DA-36-038-AMC-773(a), incurring a large loss due to excess of over-run costs which Hurd-Darbee, Inc. contended resulted from numerous verbal change orders which were later not acknowledged by the Government Contracting Officer on said contract, and delays caused by Contracting Officer's failure to produce information required to complete the contract. This cause of action was subsequently settled out of court between Hurd-Darbee, Inc. and the United States.

(g) At the time the evaluation was made for Hurd-Darbee, Inc., pursuant to a statement dated 31 March 1965, the net worth deficit had been reduced from $27,452 as of 31 July 1964 to $13,100 as of 31 March 1965. In addition, the operating loss had been reduced from $68,958 as of 31 July 1964 to $44,800 as of 31 March 1965.

(h) The Manufacturers National Bank of Detroit withdrew its line of credit on 31 October 1964 and said Bank was thereupon paid-in-full for all amounts due and owing at said time.

The evidence in this case clearly establishes that there was no conversion of any of the plaintiff's tangible property by the Government. Plaintiff claims that the hiring of all its instructors, once it lost the contract, was a con-

version of its intangible property. The Court cannot agree. An employer has no property right in its employees which can be converted. If employees are wrongfully hired away from an employer, it is a tortious interference with contract rights not a conversion. 45 Am Jur 2d §10 p 287. The sole case which plaintiff relies on for the proposition that employees constitute property capable of being taken has been reversed. *Dillon* v. *U. S.*, 230 F.Supp. 487 (1964), *reversed* at 346 F.2d 633 (9th Cir. 1965). Since recovery of damages for a tortious interference with contracts is not permitted by 28 U.S.C. §2680(h), plaintiff may not recover for the loss of its employees.

The Government cannot be liable for breach of contract. Plaintiff's contract with the Government had run out, and it had no reasonable expectation of further contracts. The Government had no duty to contract with plaintiff and could withhold new contracts with impunity even if plaintiff could prove that it would perform satisfactorily, and was, in fact, performing satisfactorily, creditably, and was not inadequately capitalized or on the verge of insolvency. *Leo Spear Construction Company v. The Fidelity and Casualty Company of New York,* 446 F.2d 439 (2nd Cir. 1971). Plaintiff cannot say the Government was bound to give it business. The evidence at trial showed that the Government was considering extending plaintiff's contract for no more than six months in any event, and plaintiff wholly failed to make any showing that it could get any other contracts with anyone thereafter. Plaintiff cannot claim against the United States the value of rights which the Government may grant or withhold if it chooses. *U.S. v. Twin City Power,* 350 U.S. 222, 228; cf. *U. S. v. Virginia Electric Co.,* 365 U.S. 624.

Plaintiff also claims that Section 10 of the Administrative Procedure Act. 5 U.S.C. §702, entitles it to recover the costs of preparing and submitting the bid.

Section 10 provides that:

> "A person suffering legal wrong because of agency action, or adversely affected or aggrieved by agency action within the meaning of a relevant statute, is entitled to jurisdictional review thereof."

It has been held that this Section does grant a cause of action to a bidder who is adversely affected by acts of Government Procurement Officers. *Scanwell Laboratories, Inc.* v. *Shaffer,* 424 F.2d 859 (D.C. Cir. 1970).

However, the bidder's exclusive remedy under the Administrative Procedure Act is provided for in 5 U.S.C. §706(2), which provides:

> "*Scope of review.* • • • [The reviewing Court] shall • • • (2) hold unlawful and set aside agency action, findings, and conclusions found to be (A) arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law; • • •."

Plaintiff is not entitled to recover money damages for any alleged violation of the Administrative Procedure Act. In fact, recovery of this type is specifically barred by 28 U.S.C. §2680(a), which provides:

> "The provisions of this chapter and section 1346 (b) of this title shall not apply to—
>
> (a) Any claim based upon an act or omission of an employee of the Government, exercising due care, in the execution of a statute or regulation, whether or not such statute or regulation be valid,

> or based upon the exercise or performance or the failure to exercise or perform discretionary function or duty on the part of a federal agency or an employee of the Government, whether or not the discretion involved be abused."

Thus, money damages cannot be recovered for any injury which rises out of discretionary acts which were performed by the Government employees in the present case. *S & S Logging Co.* v. *Barker*, 366 F.2d 617 (1966).

Plaintiff claims that its financial situation should not have been an impediment to the award of the language school contract because almost the whole of plaintiff's expenses were salary, and the Government's monthly payments under the contract were more than sufficient to cover plaintiff's salary expenses. However, the Lackland Air Force School was only one division of Hurd-Darbee. The corporation could have operated unprofitably even though one of its divisions remained in the black. In assessing the financial stability of the corporation, Government employees would be negligent in their duties if they evaluated only one division of the corporation and ignored the others.

Plaintiff also claims that the contracting officer should not have relief on the official Government report he received on plaintiff's financial condition. No matter how many sources of information Mr. Shaw had relied on, plaintiff could criticize him for not relying on still more. Plaintiff has not proven a branch of any duty by the officer, and Mr. Hurd admitted in substance the accuracy of the pre-award survey on which Mr. Shaw relied (T. 213-255).

It is true that an official of the SBA testified that his files contained no record of a request from Lackland Air

Force Base for an SBA certificate of competence for plaintiff. It is also correct that the pertinent regulations directed Lackland to request a certificate of competence. However, it is also correct that the same regulations permit a waiver of the requirement that a certificate of competence be requested, ASPR 1-705.4-B, and the waiver was made in the instant case. (T. 153-154, Tab 4-C). More important, perhaps, is the fact, continuously overlooked by plaintiff in all of plaintiff's pleadings and briefs, that the entire solicitation for bids was cancelled by the Government (T. 137-210).

Plaintiff claims that defendant "entered into a deal" with another contractor. No such fact was ever proved by plaintiff or admitted by defendant. What did happen was that the invitation for bids was cancelled altogether. The invitation for bids contained a reservation of the Government's right to reject all bids (Tab 1-D). Plaintiff also claims that defendant gave a false reason for cancelling the IFB. However, plaintiff heretofore never alleged, and certainly did not prove, that the defendant ever gave such a reason for cancelling the IFB. Nevertheless, the alleged statement that the services were no longer required is accurate because the defendant determined that it could perform those services itself.

In summary, plaintiff has failed to establish that it is entitled to recover money damages based on a contract or on a tort theory.

Therefore, IT IS ORDERED that judgment be, and hereby is, entered for the defendant.

/s/ Fred W. Kaess
Fred W. Kaess
Chief United States District Judge

APPENDIX B

Appeal from the United States District Court for the Eastern District of Michigan, Southern Division

(No. 73-1120)

(U. S. Court of Appeals—Sixth Circuit)

(Hurd-Darbee, Inc. v. United States of America)

(Filed June 13, 1973)

Decided and Filed.....

Before: Celebrezze, Miller and Lively, Circuit Judges.

Per Curiam. The facts were stipulated by the parties and trial was before the district judge without a jury. The Air Force has operated an English language school for foreign military personnel at Lackland Air Force Base, Texas for a number of years. Although the school is operated and supervised by the military, civilian employees of the Air Force serve as language instructors. In addition, for a number of years prior to the time involved in this controversy, the teaching corps at the language school was supplemented by government contracts with civilian firms which supplied instructors for the school. These contracts were let for terms of one year from September 1 and were entered into after an invitation to bid, a bid opening and an award to the successful bidder.

For four consecutive years the appellant had been awarded a contract to supply language instructors to the school and the last of these contracts was for the term beginning September 1, 1964 and ending August 31, 1965. In

May of 1965 an invitation to bid was sent to a number of prospective bidders and when the bids were opened appellant was found to be the low bidder. Its representative at the opening was advised that a pre-award check would have to be made as to the eligibility of appellant for the contract. There had previously been some question about financial stability of Hurd-Darbee and at the trial it was stipulated that at the time of the bidding appellant had a deficit in working capital and net worth, although both had been reduced in the period of the last contract and the company had shown a profit during the immediately preceding eight-month period. Because neither appellant nor the second or third low bidder could satisfy the financial requirements of the Air Force, there were inconclusive discussions about the possibility of a new contract for a term not to exceed six months. On August 25, 1965, all bidders were notified that the invitation for bids had been canceled and that the Air Force would hire instructors directly after August 31, 1965.

On the same day the military officer in charge of the English language school called an emergency meeting of the 40 or 45 instructors employed by appellant and informed them that there was no contract with any bidder after August 31, that the school needed instructors to carry on its work and that the Air Force planned to hire instructors on an emergency 30-day basis. The instructors were advised of Civil Service requirements and that if they were hired as Civil Service personnel the salary for each instructor would be approximately 40 per cent in excess of that which was being paid by Hurd-Darbee. The entire teaching force previously furnished by appellant was employed directly as of September 1, 1965 by the Air Force. The hiring of the instructors did not effect Hurd-Darbee's performance of its own contract which was satisfactorily completed on August 31, 1965.

The complaint, as amended, sought damages for wrongfully converting and expropriating "all of Plaintiff's entire organization at Lackland Air Force Base and its entire property and personnel . . . " without the payment of any compensation therefor. The Air Force furnished all of the physical equipment required to conduct the English language school and appellant does not allege that any physical assets were expropriated. Its argument is that it had built up a going organization capable of performing a service at a profit and that when the government hired all of its instructors it deprived appellant of property consisting of the intangible value of its organization and that the Fifth Amendment requires compensation to be paid for such a taking.

Appellant concedes that the government had the right to reject all bids as of September 1, 1965 and that it had no vested right to continue to be a government contractor. Thus we are not concerned with issues related to the financial condition of appellant in August 1965 which occupied a great deal of attention in the district court proceedings. With respect to the issue now before this Court, the district court made this statement:

> "An employer has no property right in its employees which can be converted. If employees are wrongfully hired away from an employer, it is a tortious interference with contract rights, not a conversion. 45 Am. Jur. 2d § 10, p. 287. The sole case which plaintiff relies on for the proposition that employees constitute property capable of being taken has been reversed. *Dillon v. U.S.*, 230 F. Supp. 487 (1964), *reversed* at 346 F.2d 633 (9th Cir. 1965). Since recovery of damages for a tortious interference with contracts is not permitted by 28 U.S.C. § 2680 (h), plaintiff may not recover for the loss of its employees."

Appellant cites *Des Moines Gas Co. v. Des Moines,* 238 U.S. 153 (1915) for the proposition that the government must consider "going value" of a sccessful enterprise in addition to the value of its physical assets in setting the rates of a public utility. Also relied upon is *Monongahela Navigation Company v. United States,* 148 U.S. 312 (1893). That case held that when the government condemned a lock and dam in the Monongahela River it was required to pay the owner the value of its franchise to take tolls as well as the value of the tangible property taken. In each of these cases, of course, the underlying action of the government was against the physical property of a citizen and the Court held that the Fifth Amendment requirement of compensation was not satisfied unless the owner was paid for intangible property rights which adhered directly to the tangible assets which were affected by the governmental action. The word "property" as used in the Fifth Amendment has a broad meaning and includes the entire bundle of rights, not just the physical assets, against which the government moves.

The problem in the present case is that no definable property, either tangible or intangible, was taken from appellant. The only contract which it had with the government was continued uninterrupted to its normal termination date. It had no right to be awarded a new contract by the Air Force and, in fact, had no contracts with its own employees beyond August 31, 1965. In *Acton v. United States,* 401 F.2d 896 (9th Cir. 1968), *cert. denied,* 393 U.S. 1121 and 395 U.S. 945 (1969), it was held that the owners of revocable uranium prospecting permits which were canceled by the government were not entitled to compensation for the taking of property. When appellant put together the organization which consisted of a group of in-

structors capable of teaching the English language to foreign military personnel it acquired no vested right to a government contract. It understood that these contracts were for one year only and that at the end of any year the government might award a contract to some other supplier of similar services. Furthermore, the government had the right to reject all bids. The risk of non-renewal of its contract is very similar to the risk taken by persons who operate under prospecting permits and grazing permits granted by the federal government. The risk of cancellation of such permits and the risk of non-renewal of a service contract are such that the person dealing with the government pursuant to such a permit or contract acquires no property rights which are compensable upon revocation or non-renewal.

Since appellant had no property right in the services of its employees, their mass resignation to accept the offer of the Air Force did not deprive it of any property for which compensation must be paid. According to the testimony of its principal stockholder and head bookkeeper, Hurd-Darbee, Inc. had other business activities which were not directly connected with its contract to furnish instructors at Lackland Air Force Base. The corporation continued as a going business after the government contract expired. At most it was deprived of a business opportunity when its employees resigned, asuming that other markets for such services existed. In a different setting it has been stated that the obligation to pay compensation does not extend to the loss of a business opportunity. *United States ex rel. Tennessee Valley Authority v. Powelson,* 319 U.S. 266, 284 (1943); *United States v. Sowards,* 370 F.2d 87 (10th Cir. 1966).

The action of the Air Force in dealing with the employees of appellant was certainly not a model of ethical business behavior. Nevertheless, the government is specifically exempted from liability for tortious interference with contracts and no statutory basis for the present action has been shown. Since neither a statute nor the Constitution confers a right to recover for the acts complained of, the district court correctly entered judgment for the United States.

Affirmed.

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In the Supreme Court of the United States

OCTOBER TERM, 1973

HURD-DARBEE, INC., PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

MEMORANDUM FOR THE RESPONDENT IN OPPOSITION

ROBERT H. BORK,
Solicitor General,
Department of Justice,
Washington, D.C. 20530.

In the Supreme Court of the United States

OCTOBER TERM, 1973

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HURD-DARBEE, INC., PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

MEMORANDUM FOR THE RESPONDENT IN OPPOSITION

Petitioner, an independent contractor which supplied the United States Air Force with language instructors under a one-year contract extending through August 31, 1965, brought this suit in the United States District Court for the Eastern District of Michigan, seeking damages for an alleged wrongful conversion and expropriation of the intangible value of its business organization.[1] Petitioner's claims were based on the fact that, before the termination on August 31, 1965, of the individual employment contracts between petitioner and the instructors who it had hired and paid, the Air Force determined not to rely further upon an

[1] The complaint also sought damages for the alleged improper action of government procurement officers in processing bids to provide language services to the Air Force after August 31, 1965.

independent contractor for such services and offered civilian employment to the instructors, all of whom accepted, so that as of September 1 the Air Force employed directly the entire teaching force petitioner had previously furnished under its contract.[2] The district court entered judgment for the United States (Pet. App. A) and the court of appeals affirmed (Pet. App. B), in an opinion upon which we rely in the main.

1. Petitioner had no "property" interest in a continuing contractual relationship with the Air Force after August 31, 1965. On that date petitioner's contract with the government expired by its own terms, and the United States was under no obligation to renew it. Petitioner was thus deprived of no property by the United States. Moreover, as the court of appeals noted (Pet. App. B, 32), losses of business opportunities are not compensable under the just compensation clause of the Fifth Amendment.[3] Cf. *United States ex rel. T.V.A.* v. *Powelson,* 319 U.S. 266, 284.

2. Petitioner's claim that its employees were wrongfully hired away by the Air Force is, at bottom, a claim that, but for the government's interference, petitioner might have retained the services of its employees and marketed them elsewhere. The complaint thus seeks recovery for the government's interference with

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[2] The Air Force undertook direct hiring of language instructors only after it was constrained to reject the contract bids of petitioner and two other bidders for failure to satisfy the financial requirements of the Air Force (Pet. App. B, 29; Pet. App. A, 18-19). Petitioner satisfactorily completed its own contract with the Air force on August 31, 1965.

[3] The lower courts, in any event, lacked jurisdiction over petitioner's claim for just compensation, which would lie (if at all) only in the Court of Claims, as it is over $10,000. See 28 U.S.C. 1491, 1346(a).

unidentified prospective contractual relations which petitioner anticipated. The United States cannot be held liable on this ground. An exception to the Tort Claims Act, 28 U.S.C. 2680(h), bars any recovery against the federal government for tortious interference with prospective contractual relations. See, *e.g.*, *Small* v. *United States*, 333 F. 2d 702, 704 (C.A. 3).

It is therefore respectfully submitted that the petition for a writ of certiorari should be denied.

ROBERT H. BORK,
Solicitor General.

OCTOBER 1973.